Provisional

For participants only

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International Law Commission

Seventieth session (first part)

Provisional summary record of the 3390th meeting
Held at Headquarters, New York, on Monday, 30 April 2018, at 3 p.m.

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Present:

Temporary Chair:	Mr. Nolte
Chair:	Mr. Valencia-Ospina
Members:	Mr. Al-Marri
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.10 p.m.

Opening of the session

The Temporary Chair declared open the seventieth session of the International Law Commission.

Election of officers

Mr. Valencia-Ospina was elected Chair by acclamation.

Mr. Valencia-Ospina took the Chair.

Mr. Šturma was elected First Vice-Chair by acclamation.

Mr. Nguyen was elected Second Vice-Chair by acclamation.

Mr. Jalloh was elected Chair of the Drafting Committee by acclamation.

Ms. Galvão Teles was elected Rapporteur by acclamation.

Introductory remarks of the Chair

The Chair, after thanking the members for the trust they had placed in him, said that it was a privilege to chair the Commission and that he would make every effort to deserve that trust and to make the current session successful and productive. The strength of the Commission derived from its members' intellectual rigour and capacity, their technical knowledge and vision, their respect for each other's views, their ability to dialogue and their discipline, hard work and collegiality. The Commission was also fortunate to be supported by an extremely knowledgeable and competent secretariat.

The Commission was embarking on a historic session which would feature celebratory events to mark its seventieth anniversary. During the session, the Commission would complete its study on subsequent agreements and subsequent practice in relation to the interpretation of treaties and on identification of customary international law. It would also aim to adopt in first reading two sets of draft guidelines on protection of the atmosphere and provisional application of treaties, respectively, and continue its consideration of four other topics.

As a member from Latin America, he wished to highlight the contribution of jurists from that region to the codification of international law. He was proud to be the second national of Colombia to have been elected as a member of the Commission, following in the footsteps of Mr. Jesús María Yepes, who had been a member of the Commission from 1949 to 1953. His election as Chair of the Commission was the culmination of a legal career in the service of the United Nations spanning more than 50 years. He would do his utmost to ensure that all members participated in the Commission's work and that the current session had a successful outcome.

Adoption of the agenda (A/CN.4/709/Rev.1)

The provisional agenda was adopted.

Organization of the work of the session (agenda item 1)

The Chair invited the Bureau and the Special Rapporteurs to join him to discuss the programme of work and a number of organizational matters.

The meeting was suspended at 3.45 p.m. and resumed at 4.40 p.m.

The Chair drew attention to the proposed programme of work for the first six weeks of the Commission's current session, which would begin with the consideration of the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". The Commission would hold an election at its 3391st meeting to fill the casual vacancy which had arisen following the resignation of Mr. Kolodkin on 4 April 2018. It would also hold a plenary meeting to hear a briefing by Mr. Nolte and by the Secretary on the programme and preparations for the seventieth anniversary commemoration events. Mr. Nolte would provide the briefing in his capacity as the Chair of the advisory group tasked at the sixty-ninth session with working with the Secretariat to plan the commemorative events.

The Drafting Committee on the topic "Peremptory norms of general international law (*jus cogens*)" would meet to conclude the work left over from the sixty-ninth session.

The Special Rapporteur for the topic "Protection of the environment in relation to armed conflicts" had requested that the Commission should establish an open-ended Working Group to consider the draft commentaries on the draft set of principles adopted under that topic at the sixty-eighth session by the Drafting Committee and taken note of by the Commission.

It was his understanding that Mr. Vázquez-Bermúdez would be available to chair the Working Group and that the Bureau had endorsed that proposal. He took it that the Commission agreed to establish the proposed open-ended Working Group chaired by Mr. Vázquez-Bermúdez.

It was so decided.

The Bureau had endorsed a suggestion that the Commission, in principle, should meet on Monday mornings and Friday afternoons for three weeks, which was different from the usual practice, and was motivated by the fact that the Commission had an unusually heavy workload during the first part of the session, linked in particular to the conclusion of two topics on second reading, and possibly a further two topics on first reading. It was therefore important for the Commission at the current session to consider new topics for inclusion not only in its long-term programme, but also in its current programme of work.

He took it that the Commission agreed with the proposed programme of work for the first six weeks of the session.

It was so decided.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (agenda item 4) (A/CN.4/712 and A/CN.4/715)

Mr. Nolte (Special Rapporteur), introducing his fifth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/715), noted that the topic had been on the Commission's agenda since 2013; if the Commission could conclude its work thereon by the end of 2018, it would have completed its task within the comparatively short time of six years. It was true that, between 2009 and 2012, the Commission had dealt with many of its aspects within the framework of a Study Group on Treaties over time. The Study Group format for the topic showed that the Commission did not always immediately accept proposals for new topics, but sometimes tested the viability of proposals through different formats.

It followed that, in a sense, most of the draft conclusions adopted on first reading in 2016 had been considered twice by the Commission, first within the framework of the Study Group, and then again, between 2013 and 2016, in the usual format of the Commission's work, namely through its debates on the Special Rapporteur's reports, the elaboration of draft conclusions in the Drafting Committee and their adoption by the plenary, together with commentaries. States had always had the benefit of the Commission's commentaries when reacting in the Sixth Committee of the General Assembly to the work on the topic. In the Sixth Committee's four debates thereon, in 2013, 2014, 2015 and 2016, between 25 and 35 States had regularly offered comments on the submitted draft conclusions and commentaries. For that reason, the comments and observations by States addressed in the fifth report were mostly statements from the Sixth Committee's debates from 2013 to 2016; while they had been summarily reported in the Special Rapporteur's report of the year following their submission, they had not been able to be immediately fed back into the work on the topic, since the Commission had by then moved on to the next draft conclusions. Only in the fifth report therefore were those comments and observations described and evaluated in detail.

The fifth report also took into account statements by States received by the Commission after the Sixth Committee's debates in 2016 and which dealt with the set of draft conclusions as a whole. There appeared to be two reasons why such statements had been submitted by only 13 States. First, almost all the draft conclusions, with perhaps one exception, had received broad-based support among States, whose comments concerned mostly nuances or details in the commentaries and did not call into question the substance or formulation of the draft conclusions themselves. Where, exceptionally, a State had expressed substantive criticism, such criticism had not usually been shared by other States, or was shared by only a very limited number of States. Secondly, States saw no reason to repeat the comments they had made between 2013 and 2016, given that the text of the draft conclusions had not changed on first reading. Members should keep that background in mind as a superficial reading of the fifth report could give a misleading impression. The report considered practically all comments by States that reflected individual expressions of nuance or disagreement, which should not, however, distract from the basic consensus underpinning the draft conclusions and their commentaries. He hoped that the Commission would therefore be able to fine-tune and conclude its work on second reading. He had felt encouraged by the reactions of States to maintain most of the draft conclusions with only a few changes; for convenience, they were reproduced, together with his proposed changes, in the annex to the report.

He recommended that draft conclusion 1 [1a] (Introduction) should be maintained unchanged, as it had attracted few observations, none of them being seriously critical. Draft conclusion 2 [1] (General rule and means of treaty interpretation) had been generally supported by States. The only question with respect to which States had expressed different views had been whether the draft conclusion, or the commentary, should refer to the "nature of the treaty" as a relevant factor for determining whether more or less weight should be given to certain means of interpretation. After a long debate, the Commission had decided, against the view of the Special

Rapporteur, not to refer to the "nature of the treaty" in the text of the draft conclusion. Since, moreover, the views of States on the question were more or less evenly divided, it seemed preferable to maintain the reference to the question in the commentary. He therefore recommended that draft conclusion 2 should remain unchanged, except to replace the words "en el sentido" with the words "en virtud del" in the Spanish version.

With regard to draft conclusion 3 [2] (Subsequent agreements and subsequent practice as authentic means of interpretation), which had been generally approved in substance, as the two proposed terminological changes would cause the text to depart from the Commission's established terminology, he recommended that it should be maintained as adopted on first reading. Draft conclusion 4 (Definition of subsequent agreement and subsequent practice) had likewise been generally supported by States. Some specific comments and observations regarding paragraph 1 were aimed at adding substantive elements that were not necessary in a draft conclusion on definitions or were articulated elsewhere in the draft instrument or concerned the commentary. Two States had proposed changing the text to make it clear that "practice" could not consist of a single event; he did not consider that necessary or appropriate. He did, however, agree with the proposal to move the inverted commas around the term "subsequent practice", to indicate more clearly that the term to be defined was "other subsequent practice". No further changes were recommended.

Turning to draft conclusion 5 (Attribution of subsequent practice), he said that substantive considerations militated in favour of changing its formulation, which could currently be misconstrued to mean that conduct attributable to a State under the rules of State responsibility was thereby also automatically relevant for the interpretation of treaties. As had been pointed out correctly by the United States, however, there were certain acts, for example the actions of a State agent taken contrary to instructions, that were attributable to a State for the purposes of State responsibility but were not considered State practice for the purposes of the interpretation of treaties. He therefore recommended that the words "in the application of the treaty" in paragraph 1 should be moved to the end of the sentence, to make it clear that attribution under the rules of State responsibility was a necessary but not a sufficient condition, and that conduct could thus only be relevant for the interpretation of a treaty if undertaken in a recognized application of the treaty. The paragraph should therefore be reformulated as follows: "Subsequent practice under articles 31 and 32 ... may consist of any conduct which is attributable to a party to the treaty under international law and is in the application of the treaty".

As for paragraph 2 of that draft conclusion, most States had accepted its formulation, although some States had emphasized that international organizations would play a different role from that of other non-State actors. The Commission had indeed recognized, in draft conclusion 12, that the practice of an international organization might contribute to the interpretation of its constituent treaty. Since, however, the draft conclusions had addressed that important case and not specifically other situations outside the purview of the 1969 Vienna Convention on the Law of Treaties, he considered that the general rule, as formulated in paragraph 2, should be maintained.

Draft conclusion 6 (Identification of subsequent agreement and subsequent practice) had received relatively few comments from States, most of which were supportive, with some suggesting minor improvements. In that connection, he accepted the proposal by Ireland to insert the words "for example" in the second sentence of paragraph 1. He had further replaced the word "normally" with "always" in the proposed new text. He had, however, realized subsequently that the latter change might give rise to a fresh misunderstanding and that it might be better to omit both "normally" and "always". Nonetheless, he felt that the Drafting Committee should be able to resolve that minor point easily.

On draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), most of the comments received concerned paragraph 3, which addressed the difficult question of the relationship between an interpretation and an amendment or modification of a treaty, including the possible role that subsequent agreements and subsequent practice might play in that context. The different views expressed on the general question of whether subsequent practice of the parties could lead to the modification of a treaty were not meant to be reconciled by the formulation of the paragraph. It was indeed because the Commission had been aware of the long-standing divergence of views among States and courts that it had chosen the language used in the paragraph, which expressed the widest possible agreement among States and gave a nuanced answer to the question posed. The three sentences in paragraph 3 were interrelated. The commentary offered a variety of sources and described the different points of view that had existed among States at least since the elaboration of the 1969 Vienna Convention; it also provided an explanation for the language chosen in paragraph 3. As that paragraph, while not fully resolving the question for

all conceivable circumstances, offered a general direction and was therefore acceptable, he recommended that the draft conclusion should be maintained in its current form.

Draft conclusion 8 [3] (Interpretation of treaty terms as capable of evolving over time) had likewise been carefully weighed and debated by the Commission. The widespread agreement on its formulation might spring from the fact that the draft conclusion did not claim to resolve the question of evolutive interpretation in the abstract or to adopt one particular theory of such interpretation at the expense of another, but attempted, rather, to address one specific aspect of that question, namely, the possible role of subsequent agreements and subsequent practice in cases where an evolutive interpretation of a term of the treaty was appropriate. However, it did so without seeking to determine the circumstances under which such would be the case, except by providing certain widely accepted examples from international case law.

Some States had nevertheless shown concern about possible misunderstandings of the draft conclusion. The United States, for example, had stated that the term "presumed intention" did not seem to capture the important distinction that while the broad purpose in treaty interpretation set forth in articles 31 and 32 was to discern the intention of the parties, that would not be achieved through an independent inquiry into intention and certainly not into presumed intention. While confirming that broad purpose in treaty interpretation, he recalled that the Commission's traditional position was that such could not be achieved through an independent inquiry into intention.

Since, as was explained in the commentary, the expression "presumed intention" had been chosen precisely to indicate that any interpretation, including one that gave a term a meaning capable of evolving over time, must result from the application of articles 31 and 32 of the 1969 Vienna Convention and its means of interpretation, he did not see a need to further elaborate on the language of the draft conclusion.

Moving on to draft conclusion 9 [8] (Weight of subsequent agreements and subsequent practice as a means of interpretation), which had met with general agreement and a few proposals for improvement, he said that he accepted the proposal by the United Kingdom to include the criteria of "consistency" and "breadth" in paragraph 2 as relevant for the weight of subsequent agreements and subsequent practice, so that the paragraph would read: "The weight of subsequent practice under article 31, paragraph 3 (b) depends, in addition, on its consistency, breadth and on whether and how it is repeated". No further changes were recommended.

On draft conclusion 10 [9] (Agreement of the parties regarding the interpretation of a treaty), which had been generally accepted by States, there was an interesting divergence of views between the United States, on the one hand, and Sweden and other States, on the other, over whether it was correct that the parties needed to "be aware of and accept" a subsequent practice or whether the existence of a parallel practice, of which some of the parties were unaware, was sufficient. He considered that the Commission should continue its long-standing approach of requiring "awareness and acceptance" but should at the same time make it clear in the commentary, as indeed it had already done, that in certain circumstances, the awareness and acceptance of the other party or parties might be assumed, particularly in the case of treaties that were implemented at the national level.

Draft conclusion 11 [10] (Decisions adopted within the framework of a Conference of States Parties) had also been generally supported by States, sometimes with minor proposals to improve the text or the commentaries. He did not consider it necessary or even appropriate to make assessments in the text of the draft conclusion regarding the general likelihood of States Parties adopting a subsequent agreement under article 31 (3) (a), of the 1969 Vienna Convention, beyond what was already expressed in the last sentence of paragraph 2.

Draft conclusion 12 [11] (Constituent instruments of international organizations) had received many comments, mostly supportive. Spain and Romania had usefully proposed, in the interests of greater clarity, that the words "of the parties" should be inserted in the first and second lines of paragraph 2, after the words "subsequent practice", to highlight how paragraphs 1 and 2 differed from paragraph 3, whose object was not the subsequent practice of States, but the practice of the international organization as such. He did not consider it necessary, however, to follow the proposal of Romania to further emphasize that difference by inserting the words "as such" after "Practice of an international organization" in paragraph 3, as doing so could give rise to misunderstandings if the paragraph was not read in conjunction with the commentary.

Although States generally supported paragraph 3, some States had expressed concern that it might give too much weight to the practice of international organizations. Greece, in particular had recommended that it should be made clear in the commentary that the practice of an international organization that was not generally accepted by its member States carried less

weight than if it were the case. The purpose of the words "may contribute" in paragraph 3 was indeed to indicate that the weight of the practice of an international organization might vary. It could be stated even more clearly in the commentary that the agreement of the members with such practice was a primary factor for the determination of its weight. The United States and the Russian Federation had gone one step further by proposing that the reference in paragraph 3 to article 31, paragraph 1, of the 1969 Vienna Convention should be removed. However, he considered that the justification for that reference provided by the Commission in its commentary was valid and that the reference to that paragraph was based on key pronouncements in the case law of the International Court of Justice.

Draft conclusion 13 [12] (Pronouncements of expert treaty bodies) had been intensely debated, with particular reference to the "without prejudice" clause in paragraph 4, considered by some States to open further discussion of other ways in which a pronouncement by an expert treaty body could contribute to the interpretation of a treaty. They had therefore requested that the Commission should re-examine the issue, during the second reading, on the basis of observations of Member States.

He recalled that the "without prejudice" clause was what remained of his more ambitious, but nevertheless modest proposal, in his fourth report (A/CN.4/694), to acknowledge the significance of pronouncements of expert treaty bodies, as such, along the lines of the finding of the International Court of Justice and according to other authoritative sources. The Commission had ultimately decided, on the basis of the debate in 2016, to adopt the current "without prejudice" clause in paragraph 4, rather than to take up the proposal contained in his fourth report to include the following wording in what had become draft conclusion 13: "A pronouncement of an expert body, in the application of the treaty under its mandate, may contribute to the interpretation of the treaty when applying articles 31, paragraph 1, and 32". It had taken that decision not because members had called into question his substantive findings and those of the International Court of Justice, but rather because some members had expressed doubts whether pronouncements of expert treaty bodies constituted "practice in the application of the treaty" that would fall within the scope of the topic.

He proposed that the Commission should revisit its decision to replace his original proposal with the current paragraph 4, as "practice in the application of a treaty" was not confined to one particular act on the ground (as, for example, the execution of an order by the police), but often consisted of forms of cooperation among different organs within a State in which not every organ had a competence to make a binding decision. Like international organizations, expert treaty bodies had been created by States to act as their agents in the process of ensuring the proper application of treaties. The fact that such expert treaty bodies did not have the final decision-making power, but were merely an advisory element in the process of correctly applying the treaty, did not distinguish them from State organs that were involved in the application of a treaty without having the final decision-making power. More details about his proposal could be found in paragraphs 137 to 144 of his fifth report (A/CN.4/715).

He also drew members' attention to paragraphs 123 and 133 to 135 of his report, which addressed the second sentence of paragraph 3 of draft conclusion 13 and the role of silence. In that connection, he recalled that the Human Rights Committee had indicated, in a letter dated 4 April 2017 addressed to the Chair of the Commission at the time, that the second sentence, to the effect that "[s]ilence by a party shall not be presumed ... to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body", was too restrictive. The Committee had also indicated that the contribution that pronouncements of expert treaty bodies could make, whether or not they gave rise to a subsequent practice by the parties, would merit clearer recognition in the draft conclusions than in the form of a saving clause in paragraph 4 of the draft conclusion.

His own view was that the sentence was not too restrictive since, while it reflected a broad-based understanding among States regarding the feasibility and desirability, as a general rule, of their reacting to pronouncements of expert treaty bodies, that understanding, as expressed in that sentence, did not exclude the fact that certain kinds of pronouncements by specific expert treaty bodies might under certain circumstances be considered as being accepted by States even if they had not reacted after their adoption.

He noted in conclusion that, with the exception of draft conclusion 13, the draft conclusions rested on a broad-based agreement among States and should therefore require only minor revisions. He hoped that the Commission would be able to adopt the draft conclusions, together with the commentaries, and conclude its work on the topic during the current session.

On that basis, he proposed that the Commission should recommend to the General Assembly to take note of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of

treaties in a resolution, to annex the draft conclusions to the resolution, and to encourage their widest possible dissemination; and to commend the conclusions, together with the commentaries thereto, to the attention of States and all who might be called upon to interpret treaties.

Programme, procedures and working methods of the Commission and its documentation (agenda item 12)

Mr. Šturma (Chair of the Planning Group) announced that the Planning Group would be composed of Mr. Cissé, Ms. Escobar Hernández, Mr. Gómez-Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Mr. Nolte, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez and Sir Michael Wood, together with Ms. Galvão Teles (Rapporteur), *ex officio*.

The meeting rose at 5.50 p.m.